131-60

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 302.

L. M. PALMER, PLAINTIFF IN ERROR,

vs.

E. F. ARTHUR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED JULY 20, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, MARCH 1, 1889.

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a UNITED STATES OF AMERICA, *District of Kentucky*, } ss:

The President of the United States of America to the judges of the circuit court of the United States for the Kentucky district, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between E. F. Arthur, plaintiff, and L. M. Palmer, defendant, a manifest error hath happened, to the great damage of the said L. M. Palmer, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first day of the next October term, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Frankfort, in said district, this 18th day of January, A. D. 1886, and of the Independence of the United States the 110th.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOMAS B. FORD,
C. C. C., K. D.

Allowed by—
JNO. W. BARR, *Judge.*

b [Endorsed:] E. F. Arthur *vs.* L. M. Palmer. Writ of error. Original. Filed Jan. 20, 1886. Thos. B. Ford, clerk.

c UNITED STATES OF AMERICA, *District of Kentucky*, } ss:

To E. F. Arthur, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington on the 11th day of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the said district of Kentucky, wherein L. M. Palmer is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the

Supreme Court of the United States, this 22nd day of January, in the year of our Lord 1886, and of our Independence the 110th.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

JNO. W. BARR, *Judge.*

d I hereby return this writ and certify that I have duly executed the same by delivering a true copy thereof to William Lindsay, attorney of record for E. F. Arthur, the plaintiff herein, this 22d day of January, 1886.

A. J. GROSS, *U. S. M.*,
By WALLACE GRUELLE, *D. M.*

Marshal's Fees.

To executing writ	$2 00
Expense in endeavoring to execute, in lieu of mileage, viz: R. R. fare to Frankfort (from Louisville), $1.95; hotel bill at Frankfort (supper & lodging, Jan. 22, and breakfast, Jan. 23, 1886), $1.50; R. R. fare from Frankfort to Louisville, $1.95	5 40
	$7 40

1 *Pleas Before the Circuit* Circuit *Court of the United States for the District of Kentucky, at Frankfort.*

E. F. ARTHUR, Plaintiff, *vs.* L. M. PALMER, Defendant.

Be it remembered that at a court held on the 8th day of June, A. D. 1885, the following order was entered herein, to wit:

E. F. ARTHUR, Pl'ff, *vs.* L. M. PALMER, Def't.

This day transcript was filed in the foregoing named cause; whereupon it is ordered that said cause be docketed and proceed as if originally brought in this court.

The following is a copy of the transcript referred to, viz:

2 Pleas before Hon H. F. Finley, judge of the 15th judicial district in the State of Kentucky, at the April term, 1885, of the Whitley circuit court, in the case of E. F. Arthur against L. M. Palmer, viz:

The following is the petition of pl'ff, viz:

Whitley Circuit Court.

E. F. ARTHUR, Pl'ff,
ag'st
L. M. PALMER, Def't. } Petition.

The plaintiff, E. F. Arthur, states that before the 30th of May, 1884, he had a contract with the defendant, L. M. Palmer, to make and have made for defendant an unlimited number of staves on the Cumberland river and its tributaries, in the counties of Knox
3 *of Knox* & Bell, State of Kentucky, for which defendant was to pay plaintiff $14 for each 1,000 that were 44 inches in length on the creeks & $15 per 1,000 on the river, $9 per 1,000 for 34-inch staves on the river & $8 per 1,000 on the creeks; that on the 30th of May, 1884, plaintiff had made under the contract 800,000 staves, at which time def'ts did not wish any more staves made, and plaintiff & def't agreed that no more were to be made at the time, and def't was to pay plaintiff for the staves made and paid plaintiff at the time $4,017.78 for 286.000 of the staves, and was to pay plaintiff for the remainder, 514,000 staves, on the 1st of November, 1884. Plaintiff states that of 514,000 staves not paid for and that had been made, 489,000 were 44-inch staves, — which def't was to pay $14 per thousand, & 25,000 34-inch staves, for which def't was to
4 pay $8 per thousand; that there was due and owing the pl'ff by the def't on the 1st of Nov., 1884—

For 489,000 at $14 per thousand	$6,846
For 25,000 at $8 per thousand	200

making due and owing the plaintiff by the def't for said staves $7,045. Plaintiff staves that Williamsburg, Ky., is the place where def't carries on the business of manufacturing staves, &c., & where his authorized agents were located; that at the time the money was due on said staves he called on the agent at his place of doing business for the money (the def't being a non-resident of and absent from the State of Kentucky), and he failed and refused to pay the same or any part thereof; same still due & owing the plaintiff by the def't, with interest from the 1st of Nov., 1884. Plaintiff states that all of said staves have been culled & branded by the
5 def't except about 50,000, which it was the duty of the def't to have culled and branded. Wherefore plaintiff asks judgment for said sum of seven thousand and forty-five dollars, his cost, interest, and all proper relief. Plaintiff, E. F. Arthur, says that this action is for money due by contract; that his claim is just; that he ought, as he believes, to recover seven thousand & forty-five dollars, with interest from the 1st of Nov., 1884, & cost; that the defendant, L. M. Palmer, is a non-resident of the State of Kentucky; that he is a citizen and resident of the State of New York, city of Brooklyn, but has property in the State of Kentucky, Whitley county, &c. He asks for a general attachment against the property of def'ts in the

State of Ky., or a sufficiency thereof to pay the plaintiff's debt, interest, and cost.

E. F. ARTHUR.

6 The plaintiff, E. F. Arthur, says he believes the statements in the petition are true.

E. F. ARTHUR.

Sworn to before me by the def't, E. F. Arthur, this 11th of Dec., 1884.

L. D. DENHAM, *Clerk.*

Whitley Circuit Court.

E. F. ARTHUR, Plaintiff,
against
L. M. PALMER, Defendant. } Warning Order.

The defendant, L. M. Palmer, is warned to appear in this court on the first day of its next April term and answer the petition of the plaintiff, E. F. Arthur; and John Smith, a regular practicing attorney at this bar, is appointed attorney for said L. M. Palmer, who appears from plaintiff's petition herein to be a non-
7 resident.

Given under my hand this 11th day of Dec'r, 1884.

L. D. DENHAM, *Clerk.*

Upon which petition is the following endorsement, viz.:

1184, Dec'r 11th. Filed in the clerk's office of the Whitley court. Attachment bond. Executed attachment & copy issued, warning order made & att'y appointed for non-resident. Att.: L. D. Denham, clerk.

The following is the attachment bond executed by def't, viz.:

Attachment Bond.

THE COMMONWEALTH OF KENTUCKY:

Whitley Circuit Court.

E. F. ARTHUR, Plaintiff,
versus
L. M. PALMER, Defendant. } Bond.

We undertake that the plaintiff, E. F. Arthur, shall pay to
8 the defendent, L. M. Palmer, the damage, not exceeding ($14,090) fourteen thousand & ninety dollars, which he may

sustain by reason of the attachment in this action if the order therefor is wrongfully obtained.

This the 11th day of Dec'r, 1884.

E. F. ARTHUR. [SEAL.]
W. G. COTTSTON. [SEAL.]
W. M. BINGHAM. [SEAL.]

Attest: L. D. DENHAM, *Clerk.*

The following is the order of attachment that issued, viz:

Whitley Circuit Court.

E. F. ARTHUR, Plaintiff,
vs.
L. M. PALMER, Defendant. } Order of Attachment.

The Commonwealth of Kentucky to the sheriff or any constable of Whitley county, or the marshal of Williamsburg:

You are commanded to attach and safely keep the property
9 of the defendant, L. M. Palmer, in your county not exempt from execution, or so much thereof as will be sufficient to satisfy the claims of the plaintiff in this action, E. F. Arthur, for the sum of ($7,045) seven thousand and forty-five dollars and — cents, with interest from the — day of ——, 188–, $30.00, for the probable cost thereof; and you will summon —— ——, garnishee, to answer herein on the 1st day of the next April tearm of said court. Make due return of this order on that day.

Given under my hand, as clerk of said court, this 11th day of Dec'r, 1884.

L. M. DENHAM, *C. W. C. C.*

Upon which order of attachment is the following endorsement and sheriff's return, viz: Came to hand Dec'r 12th, 1884, at 2 o'clock p. m. B. H. Sharp, sh'ff, by J. M. Mahan, D. S.

10 Levied this attachment on a stave factory in Williamsburg, Whitley county, Kentucky, & the lots on which — is built and the land attached thereto, with all the machinery in the factory for making and manufacturing staves & barrels, consisting of three engines, with boilers and all the tools therein, by posting up a copy of this order of attachment on the said factory and delivering a copy of same to Chas. A. Packard, who has same in possession & is the agent of L. M. Palmer; also levied the same on a house and lot in Williamsburg, Ky., Whitley county, occupied by G. W. McKinsey, by delivering a true copy of this order of attachment to said McKinsey; also levied on a house and lot in Williamsburg, Whitley Co., Ky., occupied — C. Messingham, by delivering to said
11 Messingham a true copy of this order of attachment; also levied on a house and lot in Williamsburg, Whitley Co., Ky.,

occupied by H. F. Oxford, by delivering a true copy of this order of attachment to said Oxford; also levied on a house and lot in Williamsburg, Whitley county, Kentucky, occupied by J. J. Yebia, by delivering a true copy of this order of attachment to said Yebria; also levied on house & lot in Williamsburg, Whitley county, Kentucky, occupied by C. Harnman, by delivering a true copy of this order of attachment to said Hauman; also levied on house & lot in Williamsburg, Whitley county, Kentucky, occupied by Chas. A. Packard, by delivering a true copy of this order of attachment to said Packard; all of said property attached as the property of L. M. Palmer this 12th of December, 1884.

B. H. SHARP, *Sheriff*,
By J. M. MAHAN, *D. S.*

12 STATE OF KY., *County of Whitley:*

We, having been summoned and sworn to make fair appraisement of the personal property attached herein and named in sheriff's return, appraise same at $3,500, this Dec'r 31st, 1884.

J. S. LAWSON.
J. W. McCARTY.
A. C. KING.

The following is the bond executed by def'ts to retain the property attached, viz:

Whitley Circuit Court.

E. F. ARTHUR
vs.
L. M. PALMER

and

WM. M. BINGHAM
vs.
SAME

and

W. G. COLSTON
vs.
SAME.

} Bond.

13 I bind myself to the pl'ff, E. F. Arthur, Wm. M. Bingham and W. G. Colston in the sum of $3,500 that the def't, L. M. Palmer, shall perform the judgments of the court in these actions or its value shall be forthcoming and subject to the order of the court.

This Dec. 31st, 1884.

R. D. HILL.

Attest: J. M. MAHAN, *S. W. C.*

The following is a demurrer filed by def't to petition, viz:

Whitley Circuit Court.

E. F. ARTHUR, Pl'ff,
vs.
L. M. PALMER, Def't. } Demurrer.

The def't, L. M. Palmer, comes and demurrers to pl'ff'- petition because the facts therein stated are insufficient in law or equity to maintain a cause of action.

L. M. PALMER,
By R. D. HILL,
His Attorney.

14 Upon which demurrer is the following endorsement, viz: 1885, July 18th. Filed in clerk's office of the Whitley circuit court. Att.: L. D. Denham, clerk.

Afterwards, at the April tearm, 1885, of the Whitley circuit court, on the 14th day of April, 1885, the following order was made, viz:

E. F. ARTHUR, Pl'ff, *vs.* L. M. PALMER, Def't.

This day came the def't, L. M. Palmer, by his attorney, R. D. Hill, and entered his appearance herein and hereto, and also filed his petition and bond therefor, and moved the court to transfer this case to the circuit court of the United States for the 6th circuit and Kentucky district.

15 The following is the petition of def't for removal, viz:

In the Whitley Circuit Court, in the County of Whitley & State of Kentucky.

E. F. ARTHUR, Plaintiff, *vs.* L. M. PALMER, Defendent.

The petition of L. M. Palmer, the above-named defendent, shows to the court as follows:

That the above suit was begun against your petitioner, L. M. Palmer in the above-named court on the 11th day of December, 1884, by the filing by pl'ff of his petition & affidavit for attachment & his execution of attachment bond and the making by the clerk of this court a warning order against your petitioner and issuing of an attachment against your petitioner's property for the sum of $7,045; that your petitioner has not yet filed his answer, but has

16 entered his appearance to said (this) action, and said cause is now pending and undetermined and has not been tried, and that this April term, 1885, is the first term of said court at which the same could be tried; and at the time said suit was begun and at the present time the plaintiff was and is a citizen and resident of the State of Kentucky, and the defendant, your petitioner, was and

is a citizen and a resident of the State of New York; that the matter and amount in dispute and controversy in said suit and for which said suit was brought and pending exceeds, exclusive of costs, the sum or value of ($500) five hundred dollars, the suit being an alleged account of pl'ff against defendent for $7,045.00, as follows: 489,000 44-inch staves, at $14 per M, making $6,846; 25,000 34-inch staves, at $8 per M, $200; total, $7,045.00.

17 All of which your petitioner controverts; that said suit is a controversy which is wholly between citizens of different States and can be fully determined as between them, the said plaintiff and your petitioner, the said defendant; and the defendant, your petitioner, hereby offeres his bond in the sum of $500, with R. D. Hill & Chas. A. Packard, of Williamsburg, Whitley county, Kentucky, as his sureties, for his entering in the circuit court of the United States for the dist. wherein said suit is pending, being the sixth circuit and the dist. of Kentucky, on the first day of the next session thereof, a copy of the record in said suit and for paying all costs that may be awarded by said United States circuit court if said U. S. court shall hold that said suit was wrongfully or improperaly removed thereto; and also for his appearing and en-
18 tering special bail in such suit, if special bail was originally requisite therein, and for his complying in all respects with the provisions in the premises of the act of Congress of the United States, passed March 3rd, 1875, entitled An act to determine the jurisdiction of the circuit — of the United States and to regulate the removal of causes from State courts, and for other purposes. Wherefore the defendant, you petitioner, pravs this hon. court to accept his petition and bond, and that said (this) case or suit be removed into the circuit court of the United States, sixth circuit & dist. of Ky., and that this hon. court proceed no further in the premises.

L. M. PALMER,
By R. D. HILL, *His Att'y.*

STATE OF KENTUCKY, }
County of Whitley, } *ss:*

Affiant says he is att'y for the foregoing-named L. M. Palmer;
19 that said Palmer is absent from Whitley county. He (affiant) says he believes the statements of the foregoing petition are true.

R. D. HILL.

Sworn to by R. D. Hill before me on this the 20th day of April, 1885.

L. D. DENHAM, *Cl'k.*

Upon which petition for removal is the following endorsement, viz:

1885, April 14th. Filed in open court. Att.: L. D. Denham, cl'k

The following is bond of def't for removal, viz:

Undertaking.

Know all men by these present- that L. M. Palmer, a citizen & resident of the State of New York, as principal, and C. A. Packard & R. D. Hill, of Williamsburg, Whitley county, Ky., as sureties,
20 are jointly and severally held & firmly bound unto E. F. Arthur, of Knox county, Kentucky, in the sum of ($500) five hundred dollars; for which, well and truly to be paid unto the said E. F. Arthur, his heirs, executors, administrators, and assigns, we bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents. Sealed with our seals and dated the 13 day of April, 1885.

The condition of this obligation is such that if the said L. M. Palmer, defendant in a suit now pending in the Whitley circuit court, which is held in Whitley county, Kentucky, in which the said E. F. Arthur is plaintiff, shall enter in the circuit court of the United States for the sixth circuit & Kentucky district, on the first day of next session thereof, a copy of the record in said suit, and shall pay all costs that may be awarded by said circuit court of the United States if it shall hold that said suit was wrongfully or improperly removed thereto—
21 And shall also there appear and enter special bail in said suit if special bail was originally requisite therein; and shall comply in all respects with the provisions in the premises of the act of Congress, passed March 3rd, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States & to regulate the removal of causes from State courts, & for other purposes," then this obligation to be void, and otherwise to remain in full force and effect.

In witness whereof the said obligators have hereunto set their hands and seals this the 13th day of April, 1885.

L. M. PALMER. [SEAL.]
CHAS. A. PACKARD. [SEAL.]
R. D. HILL. [SEAL.]

Upon which bond for removal is the following endorsement, viz: 1885, April 14th. Filed in open court. Att.: L. D. Denham, cl'k.

22 Afterwards, at the April tearm, 1885, of the Whitley circuit court, on the 23 day of April, 1885, the following order was made, viz:

E. F. ARTHUR, Pl'ff,
against
L. M. PALMER, Def't. } Order Removing.

On the pleadings and proceedings herein and on the petition and bond filed herein by the defendant, L. M. Palmer (being the defendant in the above-styled action), under the provisions of an act of

Congress of the United States passed March 3rd, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, & for other purposes," and on motion of R. D. Hill, counsel for def't, it is ordered that the security offered by the said def't, L. M. Palmer, be approved, and that the State court proceed no further in the cause, and that the cause be removed into the circuit court of the United States for the sixth circuit & Ky. dist.; to all which the defendant excepts.

23 STATE OF KENTUCKY, } ss:
Whitley Circuit Court, }

I, L. D. Denham, clerk of the Whitley circuit court, certify that the foregoing — pages of written matter contain a true and complete copy of the record in case of E. F. Arthur against L. M. Palmer, in Whitley circuit court, as same remains on file in my office.

Given under my hand this 27th day of May, 1885.

L. D. DENHAM,
Clerk Whitley Circuit Court.

Afterwards, at a court held on the 8th day of June, A. D. 1885, the following order was entered herein, viz:

E. F. ARTHUR, Pl'ff, *vs.* L. M. PALMER, Def't.

This day came the plaintiff and defendant in the foregoing-named cause. Thereupon it is ordered that the defendant in said cause be allowed thirty days in which to file his answer herein, and the plaintiff is allowed twenty days thereafter in which to reply, and
24 the defendant given twenty days thereafter in which to rejoin, said cause having this day been filed in this court.

Afterwards, at a court held on the 9th day of June, A. D. 1885, the following order was entered herein, viz:

E. F. ARTHUR, Pl'ff, *vs.* L. M. PALMER, Def't.

A rule is hereby awarded against the plaintiff to deposit fifty dollars in the foregoing-named cause by the first day of the next term as a deposit for costs, said cause having been filed in this court on yesterday.

Afterwards, on the 6th day of July, A. D. 1885, the defendant, by attorney, filed his answer herein. A copy of same is as follows:

E. F. ARTHUR, Pl'ff,
against
L. M. PALMER, Def't. } Answer.

Par. 1. The defendant, L. M. Palmer, for answer to the plaintiff's petition, says it is true that before May 30th, 1884, he had a contract

with the plaintiff whereby defendant agreed to pay certain prices as the purchase-money for an unlimited number of staves of certain clearly specified and stipulated dimentions and qualities which the plaintiff might make or have made and pay for for defendant in a certain specified territory in Knox & Bell counties, Kentucky, on the Cumberland river and its tributaries; but he avers *avers*
25 that the plaintiff in his petition does not fully nor accurately state the agreement between them.

Defendant states that by the contract between him & plaintiff in respect to said staves the 44-inch staves were all to be 4½ inches wide clear of sap, one inch thick on the heart edge and to be clear of worm holes, short crooks, knots, &c., and the 34-inch staves were all to be likewise 4½ inches wide, clear of sap, ⅛ of an inch thick on the heart edge and clear of worm holes, knots, short crooks, &c., and all of them were to be delivered on said streams & banked thereon at places above high-water mark and all upon inspection were to come up to contract requirement.

For the staves 44 inches long & of the other dimensions &
26 qualities above stated the defendant agreed to pay plaintiff $15 per thousand for them on the Cumberland river bank, in said counties, below Pineville, Ky., and $14 per thousand on the creeks at points on the creeks where running them into the Cumberland river would not cost over one dollar per thousand, and for the 34-inch staves of the dimentions & qualities hereinbefore stated in respect to them the defendant agreed to pay plaintiff $9 per thousand for them on the Cumberland river bank, in said counties, below Pineville, Ky., and $8.00 per thousand on the creeks at points thereon where running them into the Cumberland river would not cost over one dollar per thousand, and the said contract related to and embraced only such staves as might be made by the plaintiff himself or which might be made by others and paid for by plaintiff.

27 Par. 2d. The defendant denies that he ever contracted or agreed with the plaintiff to take or pay for staves merely 44 inches or merely 34 inches long at any price or place or at all, nor in case of staves made by or which were the property of other persons than the plaintiff did defendant ever agree to take or purchase them from plaintiff or to pay plaintiff for them until they had been paid for by the plaintiff or had in some way come under his lawful dominion & power.

Defendant denies that he ever at any time had any contract with the plaintiff which did not fully specify and stipulate that all staves were to be of the dimentions & qualities, respectively, as stated in the 1st paragraph of this answer, all the allegations in which are now referred to and made parts of this paragraph as fully as if copied at large herein; and defendant denies that he
28 ever agreed to pay plaintiff the prices above & hereinbefore set forth for any staves which were not the property of the plaintiff or within his power lawfully to sell; and he also denies that he ever in any manner agreed to pay plaintiff any price or sum whatever for merely having staves made by others for de-

fendant. The defendant denies that on the 30th of May, 1884, or at any other time the plaintiff had made under any contract with defendant 800,000 or any other number exceeding 295,350 staves of the dimentions & qualities mentioned hereinbefore & specified in the contract between the parties, as herein stated.

He denies that the plaintiff had at that time or at any later time made 800,000 staves of any dimentions or quality whatever,
29 or any number exceeding 295,350, and he denies that he then or at any time agreed to pay plaintiff on Nov'r 1, 1884, or at any time for 514,000 staves or any other number, except that he then and at all times agreed to and was perfectly willing and anxious & ready to take and pay for any and all staves, whether made or procured from others by the plaintiff, which came up to contract, viz., all which were of the dimentions and qualities specified in the contract between the defendant & plaintiff stated in the 1st paragraph of this answer. He says it may be true that some of the staves were 44 inches long & that some of them were 34 inches long, but he denies that plaintiff made for defendant 489,000 or any other number of staves merely 44 inches long or 25,000 or any other number of staves merely 34 inches long under any contract
30 or agreement whatever or at all. He denies that plaintiff was ever in anywise authorized or contracted with to make any such staves or to have them made or to purchase them for defendant. He says he has not sufficient knowledge or information to form a belief as to whether the plaintiff had at any time made any staves whatever, except those accepted by defendant and fully paid for by him before this action was brought. He denies that he is indebted to plaintiff in any sum whatever. He denies that he has culled or branded any staves belonging to plaintiff, except those he has accepted and paid him for, and he denies that it was his duty to cull or brand the 50,000 staves or any part of them mentioned in plaintiff's petition. He denies that any one or more of said 50,000 staves so mentioned were the property of plaintiff or were in
31 anywise made or owned or paid for by him, and he also denies that plaintiff has any right whatever to them or to recover from defendant the value or price of any part of the same. He denies that the plaintiff has any interest in the said staves or in any question pertaining to them or to their culling or branding.

Par. 3. Defendant, further answering, states that shortly before the 30th day of May, 1884, the plaintiff claimed to have on hand, under the contract mentioned in paragraph 1 of this answer, 800,000 staves, and so then represented to the defendant, but said representations were not true. However, on inspection it was found that he did then have on hand 295,350 staves, which defendant found to be according to the contract, and no more than that number (that number, indeed, including 30,999 staves which had been
32 washed away), and defendant on that date paid the plaintiff for the whole number the sum of $4,017.87 mentioned in the petition. Since that date the defendant has not accepted nor has he had an opportunity to accept any more staves from the plaintiff, but he has also accepted & received from persons making & owning

the staves within the territory covered by the agreement with plaintiff about 13,000 staves, and has, with the plaintiff's consent, paid to the persons so making or owning such staves (& who were in nowise parties to the contract between plaintiff & defendant) the full price thereof at the rates before stated herein, viz., the gross sum of $153.69, of which was paid to George Walker $20.48, to Dan. Bingham $49.85, and to John M. Conant $54.87, and to Thomas Scalf $28.17.

The plaintiff did not make nor did he own at any time any
33 of said 13,000 staves, nor were any of them at any time his property nor had he any interest in them, nor had he ever paid to the owners of them any part of the price or value of the same; yet they are that many of the staves the price of which plaintiff sues for herein. Defendant denies plaintiff's right to recover the price of said staves or any part of it.

Par. 4. Further answering, the defendant says that within the territory in which it was agreed the plaintiff should make or have made and pay for staves for defendant of the dimentions and qualities stated in paragraph 1 of this answer, up to May, 1884 (at which time the parties agree in saying the contract finally ceased, although, on defendant's written notice to plaintiff, it had been terminated November 9th, 1883, except as to timber then cut & not
34 worked up), there had been made, by persons other than the plaintiff, a large number of staves, but how many of them came up to the contract requirements was never ascertained, nor does this defendant know, nor has he sufficient knowledge or information upon the subject to form a belief; but he says that the plaintiff never owned or paid for the said staves or any of them, nor has he any right of property in them or any of them, although the entire number of said staves are embraced in and, including those named in par. 3, are indeed all those the price of which the plaintiff sues for in this action. It is possible there were 150,000 of such staves, but, for the reasons & on the facts stated herein, the plaintiff has no right whatever to recover of this defendant any sum of money whatever in respect of said staves or the price or value of the same; and the defendant furthermore expressly avers that all the
35 staves for the price of which plaintiff has sued in this action were staves made and owned by persons other than himself, & he has no sort of right to recover for the same.

Par. 5. Further answering, defendant avers that before the institution of this action he had fully paid to the plaintiff every cent he owed him, and had fully paid him for every stave made by him for defendant of the dimentions & qualities stipulated & agreed upon between them, and also for every stave procured for defendant by the plaintiff under their said agreement and for every one which the plaintiff in any way had a right to sell or receive the price for.

Having fully answered, he prays to be dismissed hence with his costs & all proper relief.

R. D. HILL,
J. H. TINSLEY, AND
36 WALTER EVANS,
For Defendant.

DISTRICT OF KENTUCKY, *sct:*

Affiant, A. S. Wood, says he is the agent of the defendant, L. M. Palmer, who is absent from said district, and he believes the statements made in the foregoing answer are true.

AB'M S. WOOD.

Sworn to before me by A. S. Wood this 2d day of July, 1885.

J. H. TINSLEY,
U. S. Com's.

Afterwards, on the 25th day of July, A. D. 1885, the plaintiff, by his attorney, filed a reply herein.

A copy of said reply is as follows, viz:

37 E. F. ARTHUR, Pl'ff,
against
L. M. PALMER, Def't. } Reply.

For reply to defendant's answer plaintiff denies that the staves continued to be made and delivered to defendant were to be each 4½ inches in width. The agreement was that they were to run from 3 inches to 4½ inches. They were to be free from holes, knots, short crooks, and clear of sap, and were to be subject to the inspection and approval of defendant.

Under the original contract it was agreed that defendant should pay to pl'ff a bonus of one dollar per thousand on all the 44-inch staves in addition to the contract price as set out in the answer herein. It is not true that defendant was to have the right to hold back pl'ff's money or any part of it till he should satisfy the
38 persons who made the staves. With pl'ffs contracts with these persons the defendant had nothing to do. Plaintiff says that prior to the 30 of May, 1884, defendant's agents had inspected, culled, and branded the 800,000 staves mentioned in the petition, except about 50,000, and pl'ff was then demanding pay for the staves that had been inspected and *are* demanding that defendant should inspect and pay for the said 50,000. He was also demanding that defendant should pay him the agreed bonus on the 44-inch staves which had been delivered and were ready for delivering, and which aggregated about 2,300,000. He says that after a full review of the accounts between the parties and of the reports of defendant's stave inspectors, so far as they could be found, it was agreed between the parties that pl'ff should surrender and abandon his claim
39 for the said bonus, and that def't should at once pay for and remove the 286,000 staves named in the petition, and that plaintiff should hold the remainder of the staves, which it was then and there agreed amounted to 514,000, including the 50,000 not inspected, till the 1st of Nov., 1884, at which time defendant was to remove and pay for them. Plaintiff thereupon, in writing, released the contract under which he was asserting claim to the bonus hereinbefore mentioned, and defendant paid him the

sum of $4,017.78 for the 286,000, which were then to be removed, and then and there agreed to remove and pay for the said 514,000 on the 1st of November, 1884, or before that time. Plaintiff pleads and relies on the said contract as a bar to the claim of def't to have a recount or reinspection of the said 514,000 staves, except
40 the said 50,000 which have not been inspected, but which def't has wrongfully failed and refused to inspect, cull, and count.

Plaintiff denies that the alleged payments to Walker, Bingham, Conant, or Scalf or either of them were made with his consent or approval. He says his right to sell and deliver the 514,000 — and all of them is and always has been perfect and complete, and has never been denied by the parties who made the staves or by any of them.

He denies that he has been paid for the staves involved in this action, in whole or in part, and prays as in his petition.

JOHN DISHMAN,
W. LINDSEY, *For Pl'ff.*

E. F. Arthur says he believes the statements contained in the foregoing reply are true.

E. F. ARTHUR.

Sworn to before me by E. F. Arthur this the 25 day of July, 1885.

THOS. B. FORD,
Clerk U. S. Cir. Court.

41 Afterwards, on the 1st day of December, 1885, the defendant, by his attorney, filed a rejoinder herein.

The following is a copy of said rejoinder, viz:

E. F. ARTHUR, Plaintiff,
vs.
L. M. PALMER, Defendant. } Rejoinder.

Par. 1. The defendant, for rejoinder to the reply herein, admits that the staves might run from 3 to 4½ inches in width, but only in this way & upon this condition, to wit, that where they were under 4½ inches wide two such staves were only to be counted as one stave. It is true that, under the original agreement, plaintiff was to be paid a bonus of one dollar per thousand for 44-inch staves, but only for the first two hundred thousand obtained and no more. This,
42 which amounted to $200.00, was fully paid to plaintiff, entirely outside the $4,017.78 mentioned in former pleadings, and the final receipt of the plaintiff for same is filed herewith as part hereof, and is in the words & figures following, viz:

"WILLIAMSBURG, KY., *May 13th*, 1884.

"Received from L. M. Palmer fifty dollars balance on bonus for 200,000 staves.

"E. F. ARTHUR."

There was never any agreement or contract of any kind between the parties for the payment of any other or further sum or amount for bonus. Defendant avers that he was under no obligation to pay the plaintiff for any staves until the plaintiff in some way acquired dominion or power enough over them lawfully to deliver them to defendant & lawfully put him in possession thereof; and defendant denies
43 that he had no right to hold back the price of the staves until the persons who made them were satisfied by plaintiff; on the contrary, defendant denies that plaintiff had any right in any of the staves, the prices for which are sued for herein, until he did satisfy the persons who made them, it being the fact that plaintiff made none of them himself nor did he own any of them or have lawful right or power to sell or dispose of them to defendant until he had satisfied the persons who made them. To the extent of protecting himself and securing a good title to the staves, in case he bought, used, or paid for them, the defendant did have something to do with the plaintiff's contract, with the persons making the staves, and especially with seeing that they had a right or gave a right to dispose of them. Defendant denies that prior to
44 May 30, 1884, or at all, he or his agents had inspected or approved the 800,000 staves mentioned in the petition & reply or any of them, except the 296,350 staves mentioned in the 2d & 3d paragraphs of the answer herein and there by mistake mentioned as 295,350, & all of which were paid for by the $4,017.78 mentioned therein. Defendant says, however, that some of said staves, but he has no idea how many of them, had been "culled & branded" subject to "inspection" and "approval," but it was perfectly well understood between the parties that this "culling & branding" was in no sense "an inspection" or "approval" or "acceptance" of the staves by defendant.

The defendant denies that the plaintiff was, at the time alluded to or was ever, demanding pay for any staves that had been inspected or was demanding that defendant should inspect or pay for 50,000 or any other number of staves. He denies that plaintiff was demanding that defendant should pay plaintiff the agreed or any
45 bonus on staves which had been delivered or were ready for delivery or that they aggregated 2,300,000. He denies that after a full review of the accounts between them and after the reports of defendant's inspectors, or at all, or for any reason or upon any consideration whatever, it was ever agreed between the parties that plaintiff should abandon his claim for said or any bonus, or that the defendant should at once pay for and remove the 286,000 or any other number of staves, or that plaintiff should hold the remainder of the staves until Nov. 1, 1884, by which time they should be taken up & paid for. He denies that it was then or at any time agreed that the remainder of said staves amounted to 514,000 or to any other number, either including or excluding the alleged 50,000
46 not inspected. He denies that plaintiff then, in writing or otherwise, released any contract under which he claimed or was entitled to a bonus, or that plaintiff ever, in fact, released his claim for any bonus beyond the aforesaid $200.00. Defendant

denies that he otherwise paid the $4,017.78 or any part thereof than as the price of said 296,350 staves actually delivered. He denies that said sum was paid upon any other consideration whatever than such price. He denies that he agreed at any time to take up, remove, or pay for any of said staves except after the regular & agreed upon inspection and approval of defendant, entirely apart from what was called customarily between the parties "culling & branding" of staves, nor did he ever claim that there should be any second "inspection" of any of said staves as distinguished from what was well known as the "culling and branding thereof.

47 The defendant denies that the right of plaintiff to sell and deliver the alleged 514,000 staves or any part or number of them was or has at any time been perfect or complete or even good, and avers that whether the parties or any of them who made said staves ever "denied" or had occasion to deny the right of plaintiff to sell or deliver the same or not, yet defendant denies that any of them ever admitted such right or conferred it upon plaintiff, and that, the defendant is advised, is the important thing in this action.

Defendant makes these denials, subject to the statements of paragraph 3 of his answer herein, with reference to the 13,000 staves therein alluded to.

Par. 2d. Further rejoining, the defendant says that some time before May 30, 1884, he had on hands a very large number of

48 staves, & concluded to exercise the option he had under his contract with plaintiff to terminate the same, & he so notified plaintiff and numerous other contractors of the same character; but the plaintiff came to defendant's agent and represented that he had already made 800,000 staves ready for inspection, and stated that he had been broken twice & would be broken again if defendant would not take off his hands enough more staves to make four or five thousand dollar's worth, and also stated that he was willing to reduce the price $3.00 on the thousand, and would relinquish any claim he might have for bonus. He was told that no attention would be paid to the talk about bonus, as he had no shadow of right to anything of the sort, nor would any advantage be taken of his proposi-

49 tion to reduce the price, but that, if defendant was willing, the contract with him would then be terminated, but that defendant would at once proceed to take up & inspect & pay for enough of the staves made to amount to the sum plaintiff then needed, viz., about $4,000.00, and the remainder of the staves already made could be inspected &, if up to contract, taken later. The defendant authorized such an arrangement, & it was agreed upon between & by the parties. Defendant thereupon proceeded to the inspection of enough of said staves to amount to $4,017.78, that being the price paid for the aforesaid 296,350 staves, instead of 286,000 mentioned by plaintiff. The said $4,017.78 was paid to plaintiff & credit therefor is given by him.

The defendant did not know nor pretend to know, nor did he

50 have any means of knowing, nor did he in anywise agree, that there still remained on hands 514,000 of said staves, but he was willing and so agreed to inspect all the plaintiff then had, if any,

by November 1st, 1884, and pay for such as upon inspection should be approved and accepted as according to contract.

And defendant avers that some time previous to Nov. 1, 1884, he sent his inspectors to inspect said staves and was ready, willing, and anxious to take and pay for all of them which came up to the contract & to which he could get good title, but the plaintiff soon after the work began stopped it and refused positively to permit it to go on, and has ever since so refused, though urged to the contrary course by defendant. The makers & owners of all of the staves were persons other than the plaintiff, and in no instance had plaintiff acquired a legal right to dispose of any of said staves, but he
51 probably had upon them some sort of claim. It is plaintiff's own fault that the staves remain still uninspected & not taken up. No staves were ever to be "taken up" until defendant authorized or agreed to it, and by the words "taken up" it was always meant to include counting, inspecting, and approval by the defendant. There was never any contract under which plaintiff claimed or was entitled to a bonus except the one mentioned in the first paragraph hereof. Defendant never agreed to take, take up, approve, or pay for any staves not actually inspected and approved by him, but he was willing to approve and pay for, by November 1st, 1884, all the staves made or procured by plaintiff prior to or on May 30, 1884, which were according to contract and fairly acceptable under its terms, upon due inspection.

52 Defendant again explicitly denies that there was ever any agreement between him and plaintiff that there were 514,000 or any other number of staves on hand after the taking up of the 296,350 aforesaid. Plaintiff asserted and represented that there was that number of staves already made, but this was certainly a mistake, and defendant did not agree to it nor know anything about it, nor did he agree in any form not to ascertain the number & character and quality of said staves by inspection thereof before taking them up; yet when, at a later date & before November 1, 1884, defendant attempted to count & inspect the staves on hand with a view to approving & taking up such as were according to contract, plaintiff, as aforesaid, refused to allow it to be done, & thus the matter
53 ended, & thus it stands, with the defendant still ready & willing to take them all if they are sound and according to agreement & if he can get good title to them.

Wherefore defendant prays to be hence dismissed with his costs, and for all proper relief.

R. D. HILL,
J. H. TINSLEY, AND
WALTER EVANS,
For Defendant.

Chas. A. Packard says he is agent for L. M. Palmer, who is absent from the State of Kentucky, and he believes the statements made in the foregoing rejoinder are true.

CHAS. A. PACKARD.

Subscribed & sworn to before me by Chas. A. Packard this 18th day of November, 1885.

J. R. SAMPSON,
W. P., W. C.

54 Afterwards, at a court held on the 8th day of January, 1886, the following order was entered herein, viz:

E. F. ARTHUR, Pl'ff, *vs.* L. M. PALMER, Def't.

The plaintiff, by his attorney, Wm. Lindsay, Esq., appeared and filed a surrejoinder herein.

The following is a copy of said surrejoinder:

E. F. ARTHUR, Pl'ff,
vs.
L. M. PALMER, Def't.
} Surrejoinder.

For surrejoinder pl'ff denies that the staves under four ½ and over three inches in width were to be counted two as one.

Denies that he had no lawful right to dispose of and deliver the staves to defendant till he paid or satisfied the persons who made them.

Denies there was to be any other or further inspection of the staves by def't or his agents after they had been once culled & branded.

55 Denies that before the 30th of May, 1884, he represented to defendant's agents he had made 800,000 staves ready for *for* inspection, or that he would be broken if he (def't) did not take enough staves off his hands to make four or five thousand dollars, or that he was willing to reduce the price $3.00 in the thousand, or that def't notified him no attention would be paid to his claim for bonus, or that no advantage would be taken of his offer to reduce the price of staves, or that the staves in excess of those covered by the $4,017.78 paid to pl'ff could be inspected and taken later if up to the contract; denies that such an arrangement was agreed upon by the parties; denies that def't thereupon or at all proceeded to inspect 296,350 —; denies that def't did not know or have means of knowing there still remained on hand 814,000 of said

56 staves, or that he (def't) agreed to inspect all the staves on hand or any other than the 50,000 or 60,000 which had not up to that time been inspected; denies he stopped def't's inspectors at any time from inspecting any staves that remained unculled and -inspected, or that he refused to let the work of inspection proceed; denies that he had not acquired the legal right to dispose of and deliver all the staves in contest or any portion thereof; denies there was to be any inspection or approval by def't after he had once caused them to be culled, counted, and branded; denies there was any mistake in the number of staves estimated to be on hand May 30, 1884, or that pl'ff made any representations as to the number, or that def't's agents relied upon any representation made by pl'ff.

GOLDING & LINDSEY, *For Pl'ff.*

57 E. F. Arthur says he believes the statements contained in the foregoing surrejoinder are true.

E. F. ARTHUR.

Sworn to by E. F. Arthur Jan'y 8, 1886.

THOS. B. FORD,
Clerk U. S. Cir. Court.

Afterwards, at a court held on the 9th day of January, 1886, the following order was entered herein, viz:

E. F. ARTHUR, Pl'ff, *vs.* L. M. PALMER, Def't.

The defendant, by his attorney, filed exceptions to the depositions of S. M. Perkins, David Yeager, E. F. Arthur, Wm. Bays, Allen Messer, Henry Nelson, Ephraim Gambril, G. M. Dean, Stephen Golden, Wm. Shelton, Theophilus Bingham, Larkin Hubbard, Andrew J. Bays, J. D. Massey, James A. Ingram, W. H. Jenkins, Jas. M. Bays, A. M. Hemphill, William Rhodes, G. N. Ramsay, Isham Lawson, Lyne S. Kimmingham, Jackson Campbell, Stephen Tinsley, taken on behalf of the plaintiff herein.

58 Afterwards, at a court held on the 9th day of January, 1886, the following order was entered herein, viz:

E. F. ARTHUR, Pl'ff, *vs.* L. M. PALMER, Def't.

This day came the parties, by their attorneys; came also a jury, viz., J. W. Jackson, L. B. Warren, B. T. Elliott, C. Norwood, P. F. Smith, E. Whitesides, J. W. Jenkins, Jas. Glove, T. C. Ireland, Monroe Walker, D. T. Estill, and L. E. Francis, who were sworn to well and truly try the issue joined and a true verdict to render; and, having heard the evidence in part, they were adjourned over until Monday morning, at eleven o'clock.

Afterwards, at a court held on the 11th day of January, 1886, the following order was entered herein, viz:

59 E. F. ARTHUR, Pl'ff, *vs.* L. M. PALMER, Def't.

This day came the parties, by their attorneys; came also the jury, sworn herein on Saturday last, and, having heard the evidence in part, they are adjourned over until to-morrow morning, at nine o'clock.

Afterwards, at a court held on the 12th day of January, 1886, the following order was entered, herein, viz:

E. F. ARTHUR, Pl'ff, *vs.* L. M. PALMER, Def't.

This day came the parties, by their attorneys; came also the jury, sworn herein on Saturday last, and, having heard the evidence in part, they were adjourned over until to-morrow morning at nine o'clock.

60 Afterwards, at a court held on the 13th day of January, 1886, the following order was entered herein, viz:

E. F. ARTHUR, Pl'ff, *vs.* L. M. PALMER, Def't.

The defendant, by his attorney, filed an amended answer herein, which is traversed of record by the plaintiff.

Thereupon came the jury sworn herein on Saturday last, and having heard the balance of the evidence and the argument for the defendant, by counsel for the defendant, *by counsel for the de-*
61 *fendant*, they are adjourned over until to-morrow morning at nine o'clock.

The following is a copy of the amended answer filed by the defendant on the 13th day of January, 1886, as stated in said order, viz.:

62 E. F. ARTHUR, Plaintiff, *vs.* L. M. PALMER, Defendant. } Amended Answer to Conform to Proof.

The defendant, with leave of the court, amends his answer herein to conform to the proof as made on the trial of this action, and states that of the staves the price for which is sued for herein the following are claimed and owned by the following-named persons, and were all so claimed and owned when this suit was brought and when said staves were culled and branded, and no one of said persons has in respect to said staves authorized the plaintiff to sue for, receive, or collect in his own name or otherwise the price or value of said staves or any of them, viz:

David Yeager	60,000	(675,970)
Wm. Bays	12,641	(3,938)
Isaac Taylor		
Thomas Gambril		
Nasby Mills		
63 James Mills		
Elizabeth Mills		
James Henry Smith	75,000	
John Worm		
Ellis Bailey		
Gordon Bailey		
John Patterson		
Henry Mills		
Wesley Mills		
Henry Mills (Clarks Henry)		
Green Edwards		
Marshal Carnes		
Asa Messer		
Ellis Messer		
Hiram Gray		
Manuel Messer		

	Abraham Messer		
	A. Y. Messer		
	Moses Golden		
	S. Murphy		
	Chauncey Lewis		
	Elijah Mills		
	Derby Smith		
	Andrew Woolenu		
	James Carnes		
	Buck Smith		
	Wade Smith		
64	Martin Carnes		
	Albert Bingham		
	Martin Carnes, Jr.		
	Henry Nelson	8,000	long.
	"	1,583	short.
	Hallox Brown	1,900	
	Frank Taylor	3,200	
	Ed. Gray	2,700	
	Ulans Bingham	1,800	
	Sam. Bingham	2,700	
	James Taylor	1,900	
	L. Taylor	680	
	Arch. Jackson	5,600	
	Wils. Mayor	1,500	
	John Bingham	5,200	
	Pleas Hubbard	5,000	
	Daniel Jackson	1,800	
	Mathew Hubbard	900	
	John Hubbard	600	
	Nasby Mills	400	
	Greenbury, Jackson & Davis	400	
	Ben. Jackson	4,800	
	Moses Hubbard	650	
	Ben. Mills & D. Simpson	5,500	
	Thos. Hubbard	2,300	
		46,530	
	Larkin Hubbard	14,000	
		66,530	
65	John Scalf	3,500	
	Wiley Bright	5,000	
	Madison Broughton	430	
	Davis Bright	5,000	
	Perry Broughton	1,000	
	Betty Hammonds	900	
	Jas. Broughton	2,300	
	Josiah Saylor	2,300	

Joseph Jackson	500	
Milton Jackson	5,000	
Sol. Hammonds	2,000	
Thos. Savage	2,000	
Elias Hammonds	2,000	
Clark Mills	200	
John Mills	1,500	
Ben. Mills	400	
Jas. Hammons	5,075	
Nelson Carnes	5,340	
John Hale	1,000	
John Baker	1,000	
Wm. Mills	400	
Ben. Mills	1,200	
Wm. Shelton	2,000	
Silas Brown	500	
	47,545	
Joseph Parton	300	
66 John F. Goodwin	3,000	(long).
Do	767	(short).
Wilkerson Thompson	2,525	
Joshua Siers	10,044	
E. Centers	700	
John Carroll	500	
John Firson	1,680	
Alexander Carroll	1,700	
David Sturdvant	1,700	
A. M. Carroll	3,000	
S. W. Golden	1,200	
W. P. Golden	1,200	
Wm. Rhodes	800	
D. K. Carter	1,000	
The Roland boys	7,200	
M. T. Ingram	2,500	
McGolden	8,886	
W. H. Jenkins	10,000	
Do	2,000	short.
Andy Lawson	16,000	
Morgan Davis	4,500	
Joshua Sears	7,000	
D. Davis	1,600	
J. M. Bays	6,000	
A. McHemphill	5,800	
67 Do	968	(short).
A. J. Lawson	8,675	
Phil. Rice	3,876	
Pat. Johnson	782	
"	184	(short).
Wm. Rhodes	2,643	

Frank Jones	1,300
Isom Lawson	8,760
Isom Campbell	4,300
"	80 (short).
Squire Campbell	242
"	56 (short).

Defendant prays the judgment of the court that the plaintiff is not entitled to recover as to any of the aforesaid staves.

J. K. TINSLEY &
WALTER EVANS,
For Defendant.

68 Afterwards, at a court held on the 14th day of January, 1886, the following order was entered herein, viz:

E. F. ARTHUR, Pl'ff, *vs.* L. M. PALMER, Def't,

This day came the parties, by their attorneys; came the jury sworn herein on Saturday last, and, having heard the conclusion of the argument and the charge of the court, returned into court the following verdict, viz: "We, the jury, find for the pl'ff the sum of $6,094.00, with interest from Nov. 1st, 1884.—J. W. Jenkins, foreman."

It is therefore adjudged that the plaintiff recover of the defendant six thousand and ninety-four dollars, with interest from Nov. 1st, 1884, at the rate of six per cent. per annum until paid; also his costs in this behalf expended.

69 Afterwards, on the 22nd day of January, 1886, the defendant, L. M. Palmer, filed in the clerk's office of said court an appeal bond.

The following is a copy of said bond, viz:

70 Circuit Court of the United States, District of Kentucky.

E. F. ARTHUR *vs.* L. M. PALMER.

Know all men by these presents that we, L. M. Palmer, principal, and John T. Moore and Buckner M. Creel, sureties, are held and firmly bound unto E. F. Arthur in the sum of ten thousand dollars, to be paid to the said E. F. Arthur, — executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this twenty-second day of January, A. D. 1886.

Whereas the above-named L. M. Palmer hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Frankfort:

Now, therefore, the condition of this obligation is such that
71 if the above-named L. M. Palmer shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JNO. T. MOORE. [L. S.]
BUCKNER M. CREEL. [L. S.]

Sealed and delivered in presence of—
SAM'L B. CRAIL.

Approved Jan'y 22, 1886.

JNO. W. BARR, *U. S. Judge, &c.*

Endorsed: Filed Jan'y 22, 1886. Thos. B. Ford, clerk.

Circuit Court of the United States for the District of Kentucky, at Frankfort, *sct:*

I, Thomas B. Ford, clerk of the court aforesaid, do certify that the foregoing 71½ pages contain a true, perfect, and complete copy of the pleadings, orders, and proceedings in the case of E. F.
72 Arthur against L. M. Palmer, lately pending in the said court.

Witness my hand and the seal of the said court this the 16th day of July, 1886.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOMAS B. FORD, *Clerk.*

[Endorsed:] L. M. Palmer *vs.* E. F. Arthur.

73 In the Supreme Court of the United States.

LOWELL M. PALMER, Plaintiff in Error,
against
E. F. ARTHUR, Defendant in Error.
} Assignment of Errors.

And now comes the said plaintiff in error and says the circuit court, in the progress of this action & on the hearing thereof, erred to his prejudice in the following as well as other particulars, viz:

1st. In rendering judgment for the plaintiff for any sum whatever.

2d. In not rendering judgment on the trial for the said Lowell M. Palmer instead of for said E. F. Arthur.

3d. In not adjudging that the plaintiff in error on the pleadings was entitled to a dismissal of the action & a judgment for his costs.

Wherefore the said Lowell M. Palmer, plaintiff in error, prays this honorable court to reverse the judgment of the circuit court.

WALTER EVANS,
Counsel for the Plaintiff in Error.

74 [Endorsed:] Lowell M. Palmer, plaintiff, &c., *vs.* E. F. Arthur, defendant, &c. Assignment of errors. Walter Evans. Endorsed on cover: Kentucky C. C. U. S. No. 302. L. M. Palmer, plaintiff in error, *vs.* E. F. Arthur. Filed July 20th, 1886.

Supreme Court of the United States.

L. M. PALMER, - - - - *Plaintiff in Error,*

VERSUS } No. 302.

E. F. ARTHUR, - - - - *Defendant.*

Brief for the Plaintiff in Error

STATEMENT.

This action was instituted by petition in the Circuit Court of Whitley County, Kentucky, and was thence removed into the Circuit Court of the United States for said district, sitting at Frankfort, where, further pleadings having been filed, there was a trial by jury, and, a verdict and judgment having been rendered against the plaintiff in error, he has prosecuted a writ of error to this court.

No bill of exceptions was taken in the court below, and the sole question to be determined is, Do the pleadings support the judgment?

The petition on which that judgment is founded is copied on page 3 (printed record), and, leaving out the affidavit for an attachment, is as follows:

"WHITLEY CIRCUIT COURT.

"E. F. Arthur, Plaintiff, v. L. M. Palmer, Defendant—*Petition.*

"The plaintiff, E. F. Arthur, states that before the 30th of May, 1884, he had a contract with defendant, L. M. Palmer, to make and have made for defendant an unlimited number of staves, on the Cumberland River and its tributaries, in the counties of Knox and Bell, State of Kentucky, for which defendant was to pay plaintiff $14 per each one thousand that were 44 inches in length on the creeks, and $15 per thousand on the

river, $9 per thousand for 34-inch staves in the river, and $8 per thousand on the creeks.

That on the 30th of May, 1884, plaintiff had made under the contract 800,000 staves, at which time defendant did not wish any more staves made, and plaintiff and defendant agreed that no more were to be made at the time; and defendant was to pay plaintiff for the staves made, and paid plaintiff at the time $4,017.78 for 286,000 of the staves, and was to pay plaintiff for the remainder, 514,000 staves, on the 1st of November, 1884.

Plaintiff states that of 514,000 staves not paid for, and that had been made, 489,000 were 44-inch staves, for which defendant was to pay $14 per thousand, and 25,000 34-inch staves, for which defendant was to pay $8 per thousand; that there was due and owing the plaintiff by the defendant, on the 1st of November, 1884:

For 489,000 at $14 per thousand, ...	$6,846
For 25,000 at $8 per thousand, ...	200
Making and owing the plaintiff by the defendant, for said staves, ...	$7,045

Plaintiff states that Williamsburg, Ky., is the place where defendant carried on the business of manufacturing staves, etc., and where his authorized agents were located. That, at the time the money was due on said staves, he called on the agent at his place of doing business for the money (the defendant being a non-resident of and absent from the State of Kentucky), and he failed and refused to pay the same, or any part thereof, sum still due and owing the plaintiff by the defendant, with interest from the 1st of November, 1884.

Plaintiff states that all of said staves had been culled and branded by the defendant except about 50,000, which it was the duty of the defendant to have culled and branded.

Wherefore plaintiff asks judgment for said sum of seven thousand and forty-five dollars, his cost, interest, and all proper relief."

The action is by Arthur alone against Palmer alone, and is to recover the alleged *contract price* of certain staves. No delivery or offer of the staves is averred or anywhere shown, nor is any acceptance or appropriation of them by Palmer averred or suggested, nor is it shown that Arthur was ready or able to deliver them. On the contrary, the following facts are admitted in the record to be true:

1. That Arthur never made any of the staves, the price of which he sues for.

2. That the makers and owners of all the staves, the prices of which are sued for, are persons other than Arthur.

3. That Arthur was never the owner of any of them, and never had any property in them, and he shows no assignment to himself of their price, or of the staves themselves.

4. That the staves were to be subject to the approval of Palmer; and,

5. That, excepting about 290,000 staves which he took and paid $4,017.78 for, Palmer never accepted or approved, nor had an opportunity to approve or accept any of the staves whatever.

Assignment of Errors.

We complain:

1. That it was erroneous to render judgment in favor of the defendant in error for any sum whatever.

2. That it was erroneous not to render judgment for the plaintiff in error, dismissing the action with costs notwithstanding the verdict.

3. In no event does the record support a verdict for more than nominal damages.

Argument.

I.

Preliminary to a discussion of the main questions raised by the assignment of errors, we call attention to certain well-settled propositions.

In Suydam v. Williamson, 20 Howard, 433, after remarking that the operation of the writ of error addresses itself to the record as an entirety, Mr. Justice Clifford, in speaking for the court, said:

"And when the cause is removed into the Appellate Court, any error apparent in any part of the record is within the revisory power of such tribunal. The rule is, that whenever the

error is apparent on the record, it is open to revision, whether it be made to appear by bill of exceptions or in any other manner."

And in Slacum v. Pomeroy, 6 Cranch, 225, Chief-Justice Marshall said:

"Had this error been moved in arrest of judgment, it is presumable the judgment would have been arrested; but it is not too late to allege as error in this court a fault in the declaration which ought to have prevented the rendition of a judgment in the court below."

But not to multiply citations upon so familiar a proposition (important as it here is), we content ourselves with referring to the following additional very suggestive and important authorities upon the point:

Garland v. Davis, 4 Howard, 143.

United States Bank v. Smith, 11 Wheaton, 171.

Dred Scott v. Sandford, 19 Howard, 403.

McAllister v. Kuhn, 96 U. S. 87.

And especially to Barth v. Clise, 12 Wallace, 403, where the "case was inherently defective;" where "the defect was incurable and inevitably fatal," and where the court hold that "when such a defect exists, whether it be or be not brought to the attention of the court below or of this court by counsel, it is our duty to consider it and give it effect."

Precisely that course is what we contend should be pursued here, as, while the pleadings do indeed raise many issues of fact, we hold them all to be *wholly immaterial* in view of the admitted facts of the case—facts which show the case to have "defects" which are "incurable and inevitably fatal," inasmuch as they show that Arthur has no right to recover in his own name or otherwise the price of a single stave.

Furthermore, while the foregoing authorities are decisive of the matter, still we may add that under the "practice, pleadings, and forms and modes of proceeding" of the State of Kentucky (as the court judicially knows), a failure to demur, or to insist upon a demurrer in the trial court, is not a waiver of any thing substantial, and the Circuit Court was bound, by the stress of

section 914 of the Revised Statutes, not to render judgment on the verdict if the petition or record did not support it. It is an every-day occurrence in Kentucky, where a declaration is fatally defective, to leave the pleader where he has put himself, and to overthrow his judgment in the appellate court, on the ground that his pleading manifests, even if true, no right to the relief he has obtained in the trial court. Accordingly, our Court of Appeals, in Waters v. Chinn, 1 Metcalfe, 500, not to mention other cases, held that the fact that the petition does not state facts sufficient to constitute a cause of action is a valid ground of reversal, whether the objection was relied upon in the court below or not.

If, as we shall attempt to show, there were a fatal defect in the petition, there was, under our practice, fatal error in the record at the time the judgment was rendered. What has removed or neutralized it? While it is true section 914, R. S., does not in terms apply to the practice in this court, still, in a case like this, how can it be so strictly limited in its operation to the district and circuit courts as to fail to exert its influence here? To deny it at least a reflex influence here, would be practically to deny that it ought to have governed the court below.

Hence if there were, under the State practice, a fatal error in the record (to plaintiff's prejudice) when it left Frankfort, the mere trip to Washington did not eliminate that error. It is there still; and, whatever be the practice elsewhere, in Kentucky no substantial defect is waived by a failure to demur or to insist upon a demurrer, and the Kentucky Court of Appeals would reverse if this case were before it. Section 914, Revised Statutes, would become a mockery if this Honorable Court were to say that a failure below to observe the State "mode of procedure," however erroneous, was to be treated here as immaterial, for then an error fatal there would be of no consequence here, thus emasculating the statute.

While thinking cases like Slacum v. Pomeroy, Suydam v. Williamson, etc., were all that were needed, still we have thought it might not be improper to supplement our observations upon them with these further remarks:

II.

The broad question then is, Does the record support the judgment? This will depend on two others, viz: (1) Is the petition (declaration) good? (2) Are its defects in any way helped out or "put to sleep" by subsequent pleadings? We profoundly believe a negative answer must be given to each inquiry.

The suit is for the *price* of certain staves; yet no *sale* of the staves is alleged in the petition, no *delivery nor offer* of the manufactured article is shown, no *ownership* in Arthur is claimed, no *passing of the title* to the plaintiff in error is averred, and nothing like an *acceptance* or *appropriation* of the staves by him is attempted to be alleged, nor is it claimed that Arthur was ready or able to deliver them.

To the apprehension of the learned court this simple statement, coupled with an examination of the petition (P. R. 3), will make it perfectly clear, we have no doubt, that the petition is fatally defective. Under no system of pleading could it be held to show Arthur entitled to recover, whether we do or do not apply the rule of construing the pleading most strongly against the pleader.

The contract alleged is one by Arthur to make, or have made, certain staves for Palmer. Manifestly it was a mere executory agreement by Arthur to manufacture the staves himself, or to have it done by others. This being so, the authorities are very satisfactory.

In Chitty on Contracts (Riverside edition, 1874), volume 1 page 530, it is said:

"7. A contract for the making of a chattel does not of itself vest the property in the chattel, when completed, in the person who gave the order. Thus, in Mucklow v. Mangles, which was an action of *trover* for a barge, it was held that, although the party who ordered it to be built had paid money on account equal to the price, and his name had been painted thereon by the builder, the vendee acquired no property in the barge, it not having been delivered to the vendee."

This court, in the Elgee Cotton Cases, 22 Wallace, 180, and in Jones v. United States, 96 U. S. 27, discuss familiar legal

principles applicable to the case at bar, and we take leave to call attention to the opinions generally—especially the last-named, at page 27 of the volume.

In the same manner we also invite attention to sections 308, 309, 310, 311, 311*a*, 92, 78, 565, 595 of Benjamin on Sales.

In Moody v. Brown, 34 Maine, 107 (S. C. 56 Am. Dec. 640), it was distinctly held that a manufacturer can not recover the value of the article manufactured until the property has passed from him to the customer; that this property does not pass without the assent of both parties, and that there must be an acceptance by the vendee.

We invite special attention to this case, inasmuch as it is a sufficiently leading one to be made the basis of a very valuable note by the learned editor of the American Decisions, on pages 643, 644, and 645 of the volume referred to, in which may be found such accurate statements as the following, viz:

"*Nor is the mere completion of the article sufficient to pass the title,*" and

"Title to a manufactured article does not pass to the party ordering it, although the full price agreed upon be paid in advance," until delivery, or its equivalent.

In a late work, Newmark on the Law of Sales, section 115, the author says:

"The rule that the title to property does not pass while any thing remains to be done to ascertain either the quantity or price, applies as well to property thereafter to be manufactured as to that already *in esse.*

"Thus it is the general rule of law, that under a contract for supplying labor and materials and making a chattel no property passes to the vendee till the chattel is complete and delivered, or ready to be delivered.

"§ 116. In the case of a contract to manufacture goods and to sell them, it is said to be a general rule that no property in the material passes to the purchaser until the article has been finished and delivered, or is ready for delivery, and appropriated to the benefit of the purchaser, or set apart for him with his assent and accepted by him." (See also section 117.)

In section 114 the same writer says:

"Where an article is made to order the same general presumption against an immediate transfer of property holds as in the case of existing chattels; *for, on the mere agreement to supply, no specific thing can be identified as the property actually bargained for, but anything answering the description might be afterwards furnished and appropriated to the contract.*"

We beg to invite especial attention to the extreme applicability of the portions we have italicized to this case, where, although certain staves are alleged to have been "made" by somebody (we do not know who), none of them have been offered to nor received by Palmer, nor have they in any way become the property of the vender of them who assumes to sue for the price thereof, and Palmer is adjudged to pay that full value to Arthur, who has never pretended to *own* them, or to have delivered them, or to have been able, willing, or ready to do so.

Surely we can not be wrong in the contention that the petition is fatally defective, especially, as under the Kentucky Code, it is necessary to state all essential facts necessary to show the cause of action. (Hill v. Barret, 14 B. M. 82; Moxly v. Moxly, 2 Met. 311.)

III.

As we have shown, it clearly appears from the record that Arthur made an executory agreement to manufacture or to have manufactured for Palmer a large number of staves in Knox and Bell counties. There was not a *sale* of the staves, but an executory contract for their manufacture.

Necessarily and under the most elementary principles of the law of sales there were certain conditions precedent for Arthur to perform before he could recover the agreed price.

As we have shown, the petition fails to show such performance. Much was yet to be done.

The subsequent pleadings in the case raise many issues of fact, such as the dimensions of the staves; what was meant by "culling," etc. But we contend that they are all manifestly immaterial, whichever way the proof went on the trial, because of the admission *as true* of certain vital and controlling facts which neutralize, in their effect, all these numerous outside issues.

We proceed to elucidate this view, which, if established, will conclusively show that nothing in the record helps out or "puts to sleep" the defects of the petition, *but that, on the contrary, these admitted facts, taken in connection with the petition, indubitably establish that our assignment of errors is well maintained.*

Section 126 of the Civil Code of Practice of Kentucky provides that—

"Every material allegation of a pleading must, for the purposes of the action, be taken as true unless specifically traversed, excepting these, which must be proved though not traversed:

"1. Allegations of a petition or cross-petition against a defendant who is under any disability except coverture."

And several others not applicable to this case.

Doubtless the force of this Code provision is transferred with the record to this court.

Subjecting the pleading in this case to the rule prescribed by the Code, it will be seen not only that there was no sale and no offer or delivery of staves, the price of which is sued for, but also that the following material and controlling facts are conclusively admitted by Arthur, the defendant in error, *to be true*, viz:

1. That *he* never made any of the staves, the price of which he seeks to recover. Palmer's allegations to this effect (P. Rec., pp. 13, 16, and 18) are not denied, but are admitted to be true.

2. That the *makers* and *owners* of all the staves, the prices of which Arthur sues for, *are persons other than himself.* Palmer's allegations to this point (P. Rec., pp. 13, 18; MS., pp. 35 and 50) are nowhere denied, but are admitted to be true.

3. That Arthur was never the owner of any of said staves, and never had any property in them. (P. Rec., 13.) This is nowhere denied by him, but is admitted to be true. He does, indeed, curiously deny (P. Rec., 19) "that he had no lawful right to dispose of and deliver the staves to defendant (Palmer) till he paid or satisfied the persons who made them," and he did aver (P. Rec., 15) that his right to sell and deliver these staves is and always has been perfect and complete. But we submit that

these were mere *legal conclusions* of his, the entire erroneousness of which is palpable in the light of the *facts* he admits to be true.

4. It is also admitted in terms by Arthur in his reply (and could not have well been denied), that the staves "*were to be subject to the inspection and approval of defendant,*" Palmer. (P. Rec., 14.)

5. That since May, 1884, when only 295,350 staves were accepted and paid for, being all that were then on hand, the defendant (Palmer) has not accepted nor had an opportunity to accept any more staves from Arthur. Palmer's averments on this last subject, found at close of page 12, printed record, are not denied, but are admitted; and the petition, it will be observed, fails to aver either acceptance or offer of the staves, or in approval of them, or a readiness or ability to deliver them.

We have shown how the petition is defective. If such defects *could* be helped out in this case, which we utterly deny, nothing does it here.

On the contrary, the subsequent pleadings, while raising no issue as to a sale by Arthur to Palmer, nor as to Arthur's ownership of the staves, do show that there was a very different thing, to wit, an executory agreement to *manufacture* staves. The staves may, in fact, have been actually manufactured, but *Arthur has shown no right to recover in his own name or otherwise the value of the staves from Palmer.*

On the contrary, he admits: (1) That he did not make the staves; (2) that those who did are persons other than himself; (3) that he never owned or had any property in the staves, and, (4) while stating in his reply that the staves were to be subject to the approval of Palmer, he no where avers the essential condition precedent of approval by Palmer, or an offer or tender of the staves for that purpose. What he does, is to admit that Palmer never accepted nor had an opportunity to accept them.

Defendant in error shows no transfer or assignment from any maker or owner of any of the staves, no power to represent them or to be substituted for them, and *no foundation of any right to sue*

in his own name for the price. Indeed, it seems perfectly manifest from the record that Arthur sues for, and, in the court below, recovered a large sum of money as the price of staves, which he never owned, never sold, and never delivered, nor offered to Palmer, although the latter never approved nor accepted any of the staves nor acquired any ownership in or control over them; truly, we conceive, a very remarkable state of facts, which makes the errors assigned entirely manifest.

The admitted facts, coupled with an insufficient petition, we apprehend, make it idle to talk of helping out the verdict by any intendments whatever.

Nothing can help out Arther when he shows no ownership, no sale, no offer, no readiness nor ability, no delivery, no approval, no acceptance, and no opportunity to accept the staves, the price of which he sues for. (United States Bank v. Smith, 11 Wheat, 171; Barth v. Clise, 12 Wallace, 403.)

He shows no more right to recover than any other outsider. Nay, he shows conclusively that *he* has *no* right to recover. Our Civil Code requires every action to be brought by the real party in interest; see section 18, which reads: "Every action must be prosecuted in the name of the real party in interest, except as provided in section 21," which last in nowise applies here. Arthur shows no interest or legal right whatever.

In every event he misconceived his action, which, instead of being for the *price* of the staves on a *sale*, should, if he had made or owned them, and had offered them to Palmer, have been for damages for breach of an executory contract.

In that event he would have equally been required to show the very things he has not shown; and the defects are equally fatal whether his action be construed to be of one form or the other.

But assuming that any cause of complaint as to *error of form* has been *waived* by plaintiff in error, or cured by the verdict (which we deny), there is nothing that can cure that fatal showing of defective pleading and admitted facts which we have noticed.

Undoubtedly there are cases where *formal defects* are cured by verdicts, etc; but what we have here are not defects of form, but defects in the most essential and substantial things, and these are not waived.

IV.

The conjecture that Arthur *may* have agreed with a multitude of persons, on the creeks of Knox and Bell counties, to put *their* staves in under *his* contract, is no reason (even if Palmer would not have objected) why Arthur should recover in this action *in his own name*, although the probable caution of that same multitude may well be the basis on which he (Arthur) was forced to admit as true the facts we have so strongly noted above, and which show that the staves were never delivered to Palmer nor approved nor accepted by him—and yet he is subjected to a judgment for the price in favor of a man shown by the record to have no more lawful right to them than had either of the rival kings of Samoa.

We can not close this branch of the subject without the remark that the admissions of fact we have alluded to are *conclusive* in this case upon Arthur, and that they are entitled to all the weight their absolute verity can give them.

Pleadings should aver facts, not conclusions of law arising from facts not stated.

Hence, Arthur's statement of the legal conclusions we have noticed in nowise effects the case nor overcomes the facts above pointed out. (Commonwealth v. Cook, 8 Bush, 224; Bentley v. Bustard, 16 B. M. 686; Roots v. Merriwether, 8 B. Bush, 400–1.)

V.

Mr. Story, in his work on Sales, section 203, says:

"Where there is a total failure of title on the part of the vendor, the vendee may, if the contract be executory and unfulfilled, refuse to perform it, and reclaim any portion of the purchase money which he may have advanced."

We respectfully submit that that one sentence should rule this case in our favor. If there is a failure of title, there is a total failure of consideration *in a case where the matter is executory and possession has not been given.* Otherwise the result will be to make the purchaser pay, and trust to mere luck for getting possession of something to which the seller has no title, and therefore can not give any.

Of course, in this case, if Arthur had had such power or control over the staves or over the owners of them as to have enabled him to give possession of them to Palmer, or if the latter had appropriated them on a tender from Arthur, the price agreed upon could have been recovered. Or, if under like circumstances Arthur had been ready and able, and had in fact offered or tendered the staves to Palmer for his approval, and if the latter had either approved or unreasonably refused to approve, an appropriate action for damages could have been maintained, although any proper criterion of damages must necessarily have resulted in a different verdict in amount.

But however the supposed cases would have resulted, the verdict in *this case*, we submit, can in no event be maintained, because while it leaves Arthur or the owners of the staves in as full control of them as they ever were, it compels Palmer to pay full price and value for them—truly, a monstrous result.

It is elementary law, suggested alike by justice and by common sense, that it is the duty of the manufacturer or seller at once, on its completion, to deliver the article to the buyer.

This duty to deliver is a condition precedent to any right to payment of the purchase price, and, as Arthur failed to allege or show the performance of this precedent condition, he can not recover even if there be no other difficulty in his way.

And it is also elementary law that neither side can recover for any violation of such a contract unless the party suing has himself been able, ready, and willing to perform his part of it. Arthur alleges nothing of this kind.

VI.

To Recapitulate,

We confidently rest our case on the following propositions, which, we trust, we have made clear to this Honorable Court:

1. That the petition is fatally defective in not stating facts sufficient to constitute a cause of action. This is enough.

2. That if this be construed to be a suit to recover the agreed price of the staves, it is fatal to Arthur's right to recover that the record shows that *he* had no title to the property. We regard it as self-evident that he can not, in a case like this, recover the *price* of that to which he had no legal claim, and the possession of which he did not and could not give. These two considerations seem to us to be decisive and conclusive of the case. But others supplement them, namely:

3. That if we construe his suit as being one for damages for a breach of the contract, he has no right to recover, as he shows neither readiness nor ability to perform the condition precedent of delivery of the staves, nor does he allege any offer to deliver, nor any tender of the staves, nor any acts equivalent to either, nor is any acceptance or approval of them by Palmer, averred or shown.

4. That inasmuch as Arthur had no title to the staves, and as no transfer or assignment of them or their price to himself is pretended to have existed, and as there was no delivery of possession to Palmer, there was a total failure of consideration for any promise by Palmer, and a total failure on Arthur's part to do or procure the doing of any thing which put Palmer under any obligation, legal or moral, to pay Arthur any sum whatever. If any payment is made by Palmer to Arthur, he will get nothing for his money.

5. That a suit by Arthur in any event was wholly premature until he had offered the staves to Palmer, or done some act equivalent to a tender of them. He was in no condition to sue at all in any form until this was done. His petition fails to show the existence of a "matured cause of action."

Whatever may have been the evidence and whatever the instructions of the court on the trial below, it all could not countervail the facts in the record which we have pointed out; and, believing that a monstrous injustice was unwittingly done to the plaintiff in error in the judgment below, we very earnestly urge this Honorable Court to correct it by a reversal of that judgment.

Respectfully submitted,

WALTER EVANS,

1889. *Counsel for Plaintiff in Error.*

Office Supreme Court U. S.
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CLERK.

SUPREME COURT OF THE UNITED STATES.

L. M. PALMER, PLAINTIFF IN ERROR,

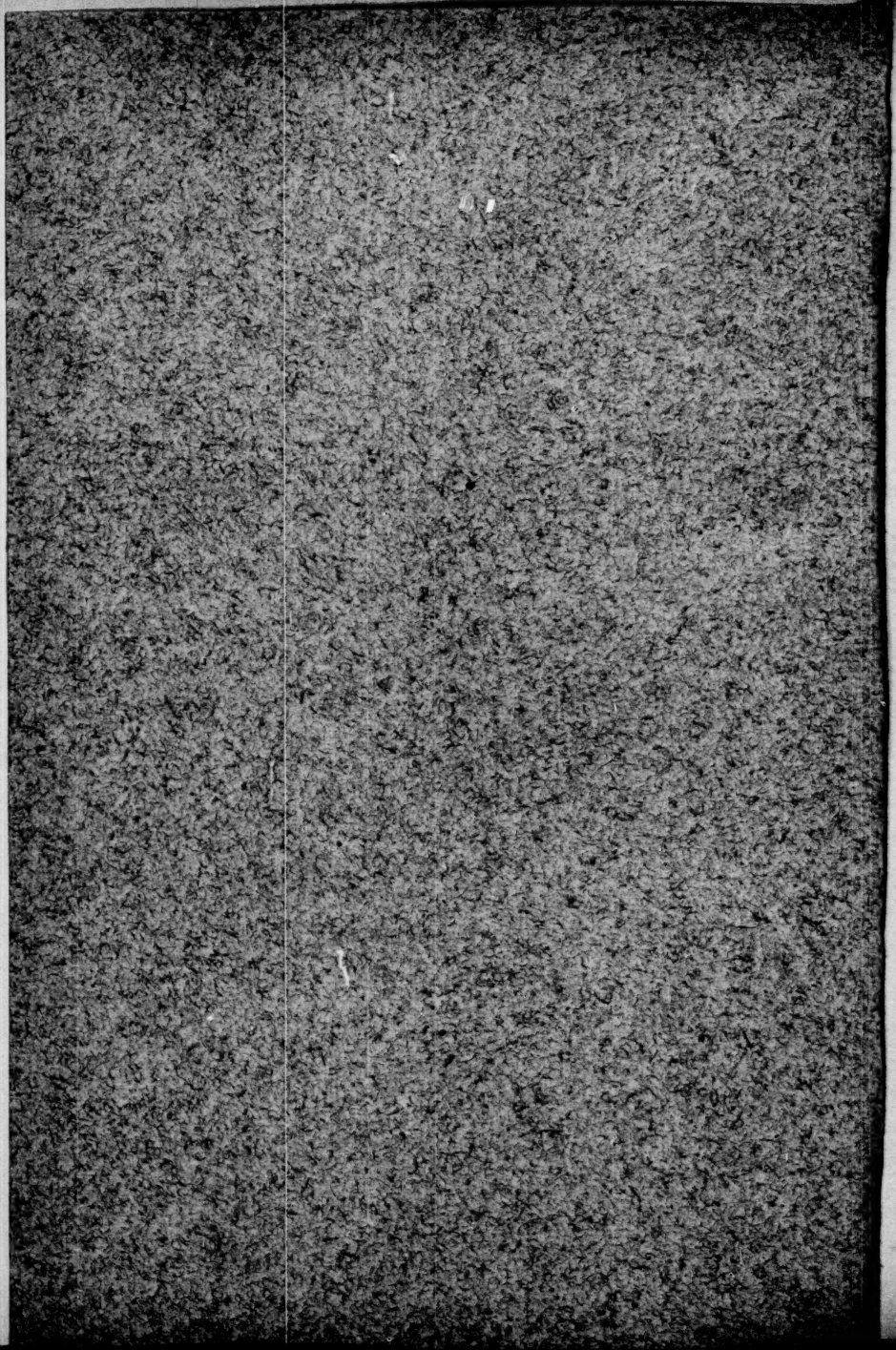
AGAINST

E. F. ARTHUR, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

WM. LINDSAY,
Counsel for Defendant in Error.

ROUNDABOUT PRINT, FRANKFORT, KY.



SUPREME COURT OF THE UNITED STATES.

L. M. PALMER, PLAINTIFF IN ERROR,

vs.

E. F. ARTHUR, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

For defendant in error the following suggestions are submitted:

Numbers one and two of the assignments of error are so clearly insufficient that they need not be considered. It is doubtful whether assignment number three is good, but for the purposes of this brief it will be treated as possibly sufficient.

STATEMENT.

This was an action at law founded upon an alleged breach of contract to pay for certain staves manufactured by Arthur for Palmer (the plaintiff in error), and culled, branded and received in the country, and upon certain streams or rivers, by the latter. The issues were made up by pleadings that were treated by the parties and the circuit court as sufficient. There was a jury trial, and a verdict and judgment in favor of Arthur for a sum exceeding six thousand dollars.

A new trial was not asked, and no bill of exceptions was filed. The transcript presents to this court only the pleadings, verdict and judgment. If the pleadings are sufficient to sustain the judgment of course there can be no reversal. Therefore the question is, was the plaintiff in error entitled to a judgment *non obstante veredicto?*

FIRST.

If the objection be to the petition or declaration, the defects of form, if any, were cured by the verdict. It can be gathered from the petition, in fact it is made clear, certainly by way of recital, if not by direct averments, that Arthur contracted to make, or caused to be made, for Palmer, the plaintiff in error, within certain territorial limits, an unascertained number of staves, of agreed dimensions, to be paid for at stipulated prices; also, that up to May 30, 1884, there had been manufactured 800,000 staves, and, at that time, that the parties agreed the manufacture should cease, the plaintiff in error agreeing to pay at once $4,017.78 for 286,000 of the staves, and to pay for the remaining 514,000 on the first day of the following November. The petition sets out the prices to be paid for the different sizes of staves, and shows a balance due as of November 1st, 1884, of $7,045. It was also distinctly averred that these 500,000 staves, except 50,000, had been, prior to May 30, 1884, culled and branded by the plaintiff in error. This petition was filed in the State court. Before answer, upon the application of the plaintiff in error, it was removed to the Circuit Court of the United States for the district of Kentucky.

No demurrer was entered, and no objection of any kind made to the petition. An answer was filed that admitted some, and put in issue others of the material facts averred in the petition. The existence of the alleged contract was conceded, and its main features were admitted. It was

claimed that the details as to size were incorrectly stated, but the answer proceeded upon the idea that there was a contract, substantially such as that claimed by Arthur. It was admitted that over 295,000 staves were received and paid for, but denied that Palmer agreed to pay for 514,000 other staves, or that he had culled or branded any staves belonging to Arthur other than those paid for May 30, 1884. (Pages 10, 11, 12 and 13.)

To this answer Arthur replied, and the plaintiff in error rejoined to the reply. (Pages 14 and 15.)

The rejoinder conceded there were other than the 295,000 staves paid for, and contained the averment that the plaintiff in error was "at once to proceed to take up and inspect and pay for enough of the staves made to amount to the sum the plaintiff then needed by $4,000; and the remainder of the staves, if up to the contract, taken later. The defendant authorized such an arrangement to be made, and it was agreed upon between and by the parties." (Page 17.)

It was then averred that Arthur refused to permit the remaining staves to be inspected. This matter of avoidance was denied by a sur-rejoinder. (Page 19.)

The issues thus raised, or understood by the parties and the circuit court to have been raised, were:

First. As to the number of stoves in excess of the 295,000 paid for May 30, 1884, that had been made by or for Arthur within the territory specified in the contract declared on.

Second. How many of these staves had been culled and branded by the plaintiff in error.

Third. Did the culling and branding amount to an acceptance of the staves culled and branded as coming up to the contract stipulations, or were the staves to be again

inspected before the delivery and acceptance were complete?

The contract not being in writing, of course these were questions of fact for the jury.

These issues excluded the claim of Arthur for pay for the 50,000 staves that had not been culled or branded.

Pending the trial the plaintiff in error filed a supplemental or amended answer, averring that the staves in contest were owned by parties other than Arthur. The allegations of this pleading were controverted of record. (Page 21.)

Upon the evidence, and under the rulings of the court, none of which are before this court, the jury returned the verdict for $6,094. And no motion for a new trial having been made, and no further objection interposed, the circuit court entered judgment conformably to the finding of the jury. If there can be a doubt as to the sufficiency of Arthur's petition, there can be none that the defects were cured by the pleadings of the plaintiff in error, and the verdict of the jury.

SECOND.

The only question insisted upon in the court below in reference to the pleadings was, the title to the staves could not pass from Arthur to the plaintiff in error till they were inspected, and upon inspection accepted as coming within the contract stipulations. But the contract, as let out by Arthur, did not provide for an inspection, other than the culling and branding, and in his petition he alleged, that at the time of the payment of $4,000, May 30, 1884, 514,000 staves, all of which except 50,000 had then been culled and branded, were to be paid for November 1, 1884. The averments are:

"And defendant was to pay plaintiff for the staves

made, and paid plaintiff at the time $4,017.78 for 286,000 staves, and was to pay plaintiff for the remainder, 514,000 staves on the 1st of November, 1884."

* * * * * * * * * * *

"Plaintiff states that all of said staves had been culled and branded by the defendant, except about 50,000, which it was the duty of the defendant to have culled and branded." (Page 3.)

And in his reply, page 14, Arthur averred: "That prior to the 30th of May, 1884, defendant's agents had inspected, culled and branded the 800,000 staves mentioned in the petition, except about 50,000." In his sur-rejoinder (page 19) Arthur "denies there was to be any other or further inspection of the staves by defendant or his agents after they had been once culled and branded."

It is manifest, from the amount of the verdict, the jury did not include the contract price of the 50,000 unbranded staves, nor the price of the 13,000 staves, for which the defendant in error claimed to have paid Walker, Bingham, Conant and Scolf. (Page 13.)

When it is considered that the plaintiff in error did not ask a new trial, and made no motion for a judgment *non obstante veredicto*, the conclusion is not difficult that he and his counsel so well understood the issues submitted to the jury that it did not then occur to them there were any serious defects in the pleadings.

If, as stated in the third assignment, the circuit court erred "in not adjudging that the plaintiff in error on the pleadings was not entitled to a dismissal of the action and a judgment for his costs," it is strange counsel did not move for judgment on the pleadings either before or after verdict.

It is respectfully submitted that the pleadings were sufficient, and that the proceedings in the circuit court are so free from apparent error that the writ of error could only